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Supreme Court, U.S.
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No. 00-001054

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IN THE

Supreme Court of the United States

TOMMY RANDELL,

Petitioner,

v.

GARY L. JOHNSON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a former state prisoner, not "in custody" under 28 U.S.C. § 2254(a), may bring an action under 42 U.S.C. § 1983 to establish the unconstitutionality of past confinement "without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy," in line with *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, JJ.); *id.* at 21-22 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting).

PARTIES TO THE PROCEEDING

The petitioner in this case is Tommy Randell, plaintiff-appellant in the U.S. Court of Appeals for the Fifth Circuit.

The respondents, defendants-appellees in the Fifth Circuit, are Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division; Melinda Bozarth, Director, Texas Board of Pardons and Paroles; and John Does I and II.

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OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fifth Circuit (App. 1a-4a) is reported at 227 F.3d 300. The decision of the district court (App. 5a-7a) is unreported.

JURISDICTION

The court of appeals decision was entered on September 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, provides in relevant part:

> **§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The federal habeas corpus statute covering persons in state custody, 28 U.S.C. § 2254, provides in relevant part:

> **§ 2254. State custody; remedies in Federal courts**
>
> **(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On June 18, 1999, petitioner Tommy Randell filed this federal court lawsuit pursuant to 42 U.S.C. § 1983. App. 5a. He alleged that officials of the State of Texas (respondents in this Court) had caused him to serve sixty-eight (68) months on a sentence of only sixty (60) months. Complaint ¶ 4. He was incarcerated for the extra eight months in connection with a DWI charge between September 27, 1996, and June 25, 1997, on a "blue warrant" that prevented him from making bail. App. 2a.[1]

Randell was never given credit for the eight months in serving the remainder of his 60-month sentence "and therefore had to serve the time over again." App. 2a; Complaint ¶ 5. On the date Randell filed his Section 1983 lawsuit he had already served the entire 60-month sentence, plus the eight months he was forced to serve again. *Id.* As relief for the eight months he was forced to serve twice, Randell sought solely money damages. Complaint ¶ 6.

The district court dismissed Randell's lawsuit based on this Court's decision in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). App. 7a. The court held that because Randell was

> challenging the fact or duration of his confinement . . . he must pursue his claim through a writ of habeas corpus before seeking damages under § 1983. Therefore, Plaintiff's civil rights complaint is dismissed without prejudice to Plaintiff's right to seek federal habeas relief after his state remedies have been exhausted.

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[1] A "blue warrant" is a warrant issued by the Parole Division of the Texas Department of Criminal Justice for the arrest of a person suspected of violating his or her parole. *See, e.g., Board of Pardons & Paroles ex rel. Keene v. Court of Appeals for Eighth Dist.*, 910 S.W.2d 481, 482 (Tex. Crim. App. 1995); *Dean v. Texas*, 900 S.W.2d 367, 367 (Tex. App.—Texarkana 1995), *pet. dism'd*, 928 S.W.2d 567 (Tex. Crim. App. 1996); *Franklin v. Kyle*, 899 S.W.2d 405, 406 n.1 (Tex. App.—Waco 1995). *See also* Tex. Govt. Code §§ 508.251(a), 508.252(2) & (3), 508.254.

App. 7a; *see also* App. 6a ("When a state prisoner seeks to challenge the fact of confinement and resolution of his claim results in speedier or immediate relief, the appropriate federal remedy is a writ of habeas corpus.").

Randell, having fully served his 60-month sentence (and then some), was no longer "a person in custody" within the meaning of 28 U.S.C. § 2254(a) and thus was unable to pursue habeas relief. App. 2a. He appealed the dismissal of the case to the U.S. Court of Appeals for the Fifth Circuit. On appeal, Randell reiterated that he had already fully served his 60-month sentence, that his Section 1983 lawsuit did not seek his release from custody, and that his sole claim was for money damages on account of having been forced to serve eight months beyond his lawful sentence. Notice of Appeal filed September 24, 1999, at 2-3, 5; Appellant's Brief filed January 26, 2000, at 1, 6-9.

The court of appeals affirmed. In so doing, it agreed that on the date Randell filed his Section 1983 lawsuit he "was no longer in custody for the term of confinement in dispute and therefore was ineligible for federal habeas relief." App. 2a & n.2 (citing 28 U.S.C. § 2254(a)). Nonetheless, the court held that Randell's lawsuit could not be heard in light of the following passage of the opinion of this Court in *Heck v. Humphrey*:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, [footnote omitted] a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

App. 2a-3a (quoting *Heck*, 512 U.S. at 486-87). Based on *Heck*, the court of appeals stated: "Because Randell is seeking

damages pursuant to § 1983 for unconstitutional imprisonment and has not satisfied the favorable termination requirement of *Heck*, he is barred from any recovery and fails to state a claim upon which relief may be granted." App. 3a.

The court of appeals acknowledged that the Second, Sixth and Seventh Circuits had reached a contrary result. These circuits predict, based on statements of five current Justices of this Court delivered in *Spencer v. Kemna*, 523 U.S. 1 (1998), that "if presented with the question" this Court "would relax *Heck*'s universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction." App. 3a & n.4 (citing cases).[2] The court instead sided with the First and Ninth Circuits which do not view the *Spencer* opinions as decisive. It stated that "we decline to announce for the Supreme Court that it has overruled one of its decisions," and it affirmed the dismissal of Randell's case based on the broad statement in *Heck*. App. 4a & n.5 (citing cases).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the existing circuit split over the import of several past opinions of this Court concerning the jurisdictional relationship between 28 U.S.C. § 2254 and 42 U.S.C. § 1983. By granting certiorari this Court can settle a jurisdictional issue that frequently arises in the federal courts, providing needed guidance on the interrelationship between habeas corpus and Section 1983 litigation.

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[2] In this connection, the court stated that "Randell has not shown that such a procedural vehicle is lacking; he speaks only of inability to obtain habeas relief." App. 3a. The district court held that habeas relief was the proper remedy for Randell's challenge to his confinement, and made no suggestion that Randell was required to pursue some sort of other procedural vehicle. App. 6a. Nor did the district court (or defendants) identify any other potentially relevant procedural vehicle.

1. In several decisions handed down over the course of the past three decades, this Court has worked to harmonize the functioning of two separate federal statutes whose text permits state prisoners access to federal court to redress grievances related to their confinement in state prisons. The most specific statute, 28 U.S.C. § 2254(a), provides that "a person in custody pursuant to the judgment of a State court" may file a habeas corpus action alleging a violation of federal law. A much more general statute, 42 U.S.C. § 1983, entitles *any* "person within the jurisdiction" of the United States — including prisoners in state custody — to file suit against state actors who deprive them of their federal rights.

The basic problem that this Court and lower courts have confronted is that if Section 1983 were interpreted to permit state prisoners to bring *all* claims alleging any sort of federal law violation by state actors, state prisoners could circumvent the various restrictions on federal habeas corpus relief simply by citing Section 1983 instead of Section 2254(a) in requesting that their convictions be overturned and/or that the length of their confinement be cut short. This Court has declined to read Section 1983 as authorizing such circumvention.

Initially, state prisoners relied on Section 1983 to challenge the deprivation of good-time credits, explicitly seeking to shorten the period of their confinement. After a divided *en banc* Second Circuit authorized such use of Section 1983, this Court granted certiorari to address what it viewed as an "important problem in the administration of federal justice" arising from "the interrelationship of two important federal laws." *Preiser v. Rodriguez*, 411 U.S. 475, 482 (1973).

The prisoner plaintiffs in *Preiser* who sought to shorten their confinement through the restoration of good-time credits were explicit in attempting to circumvent the normal habeas corpus process. They conceded "that they could have proceeded by way of habeas corpus" and sought "to avoid the necessity of first seeking relief in a state forum," insisting that they had the right to seek early release under "the literal terms" of Section

1983. *Id.* at 488. This Court rejected that argument. It stated that although Section 1983 is a "general" statute,

> despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies.

Id. at 489. Instead, the Court ruled that the habeas corpus statute provided the exclusive remedy in such circumstances, observing that "[i]n amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent" to habeas relief, and that the congressional purpose would be "wholly frustrate[d]" if prisoners "could evade this requirement by the simple expedient of putting a different label on their pleadings." *Id.* at 489-90. The Court added that policy concerns, including "considerations of federal-state comity," also favored this result. *Id.* at 490-92.

The *Preiser* holding was narrow in one key respect. The Court noted that the prisoners who had brought the litigation were seeking only the equitable relief of "restoration of their good-time credits," and hence earlier release, and had "sought no damages," so that the Court's holding was "limited to that situation." *Id.* at 494. Thus, the *Preiser* holding would not prevent prisoners from filing Section 1983 claims for damages:

> If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release — the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal

> court without any requirement of prior exhaustion of state remedies.

Id. at 494 (citation omitted). *See also Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (summarizing *Preiser* rule that "only in habeas actions may relief be granted which will shorten the term of confinement.").

Given the factual posture of *Preiser*, in which the prisoners had not sought damages, left open was the issue of whether a prisoner's "§ 1983 suit for damages stemming from an unlawful conviction" could be entertained before the prisoner had exhausted state-court attacks on the conviction itself. *Tower v. Glover*, 467 U.S. 914, 923 & n.6 (1984). The Court addressed that issue in *Heck v. Humphrey*, 512 U.S. 477 (1994), involving a prisoner's Section 1983 claim for damages "challenging the legality of his conviction." *Id.* at 479-80 & n.2, 482.

In that case, petitioner Roy Heck was serving a 15-year sentence for killing his wife. While the direct appeal from his Indiana state court conviction was pending, Heck filed a Section 1983 action in federal court complaining of unconstitutional conduct involving the investigation of his wife's death and the procedures at his trial. He sought money damages but, in light of *Preiser*, he refrained from seeking an injunction ordering his release. *Id.* at 478-79. The court of appeals upheld the dismissal of the lawsuit because it directly implicated the legality of Heck's confinement and, if Heck obtained a ruling that his conviction was illegal, the State of Indiana would be obliged to release him even though he had not sought that relief. *Id.* at 479-80.

Arguing for affirmance in this Court, the State of Indiana and its *amici* States emphasized that if incarcerated prisoners such as Heck could pursue Section 1983 litigation simply by limiting their request for relief to money damages, nothing would be left of the *Preiser* rule, as practically speaking prisoners would be able to win their release by simply winning their

Section 1983 litigation.[3] The Court in *Heck* unanimously refused to permit this result. *Id.* at 483-90 (opinion of the Court); *id.* at 490-91 (Thomas, J., concurring); *id.* at 498-99 (Souter, J., joined by Blackmun, Stevens and O'Connor, JJ., concurring in the judgment). The Justices in *Heck* all agreed that Heck's Section 1983 claim should be dismissed, as he was currently in custody and had filed a Section 1983 damages action challenging his conviction or confinement without having previously won habeas relief, and that all similarly situated prisoners should likewise have their Section 1983 claims dismissed.

However, the Justices disagreed by a 5-to-4 vote over what effect, if any, the Court's holding in *Heck* would have on "former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges." *Id.* at 490 n.10 (opinion of the Court). The majority of the Court noted that this concern was a speculative one, as "no real-life example comes to mind." *Id.* But the majority suggested that in such a situation "the principle barring collateral attacks" on criminal convictions would not be "rendered inapplicable by the fortuity that a

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[3] *See* Brief for Respondents at 23-24 (No. 93-6188) ("the fact that petitioner has sought only damages does nothing to alter that he is demanding a 'determination that he is entitled to immediate release.' *Preiser*, 411 U.S. at 500. . . . Petitioner contends that he is entitled to damages because he should not be confined, yet insists that he does not want in *this* proceeding to be released. The courts surely must assume, however, that a favorable judgment in this case would inexorably lead to another proceeding in which petitioner does seek his release. It is wholly unrealistic to view the limited request for relief as anything but a temporary form of self-restraint, designed only to avoid the exhaustion requirement but not meaningfully to alter what will ultimately be the result."); Brief of the States of Arizona, et al., as *Amici Curiae* in Support of Respondents at 26 (No. 93-6188) ("If a prisoner is not required to exhaust his state remedies before bringing a § 1983 action raising issues that call into question the validity of his conviction — the fact or duration of his confinement — no matter what forms of relief he directly requests in that § 1983 action, he may use that federal ruling to eventually obtain release. He will also avoid the other limitations of habeas. This type of end run around habeas procedures cannot be permitted.").

convicted criminal is no longer incarcerated." *Id.*

The majority's discussion of the impact of its *Heck* holding on a hypothetical future case brought by a person no longer in custody was addressed in the opinion of Justice Souter concurring in the judgment, which drew four votes. The holding in *Heck*, as Justice Souter understood it, was that to avoid a conflict between the "general" Section 1983 statute and the "specific" habeas corpus statute, a "person in custody" who is attacking his or her conviction or length of confinement must proceed under the habeas corpus statute. *Id.* at 497-500. "The Court's opinion can be read as saying nothing more than" this, Justice Souter observed. *Id.* at 500. He added that this "would be a sensible way to read the opinion," as any broader reading that would require a person not in custody to obtain habeas relief before he or she could file a Section 1983 action would "deny any federal forum for claiming a deprivation of federal rights to those who cannot first obtain a favorable state ruling," such as those "who were merely fined . . . or who have completed short terms of imprisonment, probation, or parole, or who discover (through no fault of their own) a constitutional violation after full expiration of their sentences." *Id.*

Four years later, this Court's consideration of how the *Heck* ruling might affect persons not in custody moved beyond the hypothetical to the actual.[4] In *Spencer v. Kemna*, 523 U.S. 1 (1998), the Court addressed whether a state prisoner's habeas corpus claim attacking the revocation of his parole had become moot upon the expiration of his sentence. Petitioner Randy Spencer argued that one reason his claim could not be moot was that, under *Heck*, even though he was no longer in custody he

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[4] In the interim, this Court applied its *Heck* ruling, in another case brought by a prisoner who was still in custody, to unanimously block the Section 1983 lawsuit brought by the prisoner to the extent that his attack on the procedures that had been used to revoke his good-time credits implied the invalidity of that revocation. *Edwards v. Balisok*, 520 U.S. 641, 645-48 (1997); *id.* at 649-50 (Ginsburg, J., joined by Souter and Breyer, JJ., concurring).

could not file a Section 1983 lawsuit seeking damages for the parole revocation unless he first obtained habeas relief. *Id.* at 17. The Court, by an 8-to-1 vote, rejected this argument. *Id.* (opinion of the Court); *id.* at 19 (Souter, J., joined by O'Connor, Ginsburg and Breyer, JJ., concurring).

Justice Souter's concurring opinion elaborating on this aspect of the mootness analysis, which drew the explicit support of five Justices, rejected Spencer's characterization of the *Heck* holding as follows: "*Heck* did not hold that a released prisoner in Spencer's circumstances is out of court on a § 1983 claim, and for reasons explained in my *Heck* concurrence, it would be unsound to read either *Heck* or the habeas statute as requiring any such result." *Id.* at 19; *see also id.* at 19-20 (noting that *Heck* "did not present" the situation of "a released prisoner," so that the majority opinion addressed only a "possibility"); *id.* at 21-22 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting) (stating that it is "perfectly clear" that Justice Souter's analysis of the *Heck* holding is correct).

Although the opinion of the Court in *Spencer* did not explicitly endorse this aspect of the opinion of Justice Souter, neither did it explicitly reject it. Instead, the main opinion only briefly discussed Spencer's argument concerning the *Heck* holding, stating that this argument rested on the contestable assumption that "a § 1983 action for damages must always and everywhere be available," and adding that "[i]t is not certain, in any event, that a § 1983 damages claim" by Spencer "would be foreclosed." *Id.* at 17. *Cf.* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 218 (4th ed. 2000 Supp.) (stating that in *Spencer* "[t]he Court did not rule on whether *Heck* barred a § 1983 action initiated by Spencer," and observing that because five Justices joined Justice Souter's opinion in *Spencer*, "Justice Souter's position in *Heck* now appears to command a majority.").

This Court should grant certiorari to resolve, in a concrete context, the scope of the Court's holding in *Heck*. This case squarely presents the issue of whether a former state prisoner

who is no longer "a person in custody" within the meaning of 28 U.S.C. § 2254(a) (and hence not eligible for habeas relief) is, by virtue of his release from custody, thereby jurisdictionally stripped of the ability to bring a lawsuit under 42 U.S.C. § 1983 to establish the unconstitutionality of his past confinement and win damages as the appropriate relief. Under the approach set out by Justice Souter in his *Heck* concurrence, which was endorsed by a total of five Justices in *Spencer*, it would appear that Randell should be permitted to pursue his Section 1983 lawsuit. Under the approach tentatively suggested in footnote 10 of the opinion of the Court in *Heck*, the matter would appear to be in doubt. A grant of certiorari in this case is warranted so that this Court can provide clear guidance to the lower courts, through a definitive holding concerning not a hypothetical claim but an actual claim brought by a person no longer in custody.

2. The absence of a clear holding from this Court resolving a claim brought by a Section 1983 plaintiff who is no longer in custody has left the lower courts in conflict over how to read this Court's opinions in *Heck* and *Spencer*. That conflict was succinctly summarized by the Fifth Circuit in its decision below. App. 3a-4a. We briefly review the relevant decisions.

Second and Seventh Circuits. Two circuits follow the narrow view of this Court's holding in *Heck* that was enunciated by Justice Souter in his *Heck* and *Spencer* concurrences.

The Second Circuit has issued several decisions adopting this approach. In *Jenkins v. Haubert*, 179 F.3d 19, 20-21 (2d Cir. 1999), the court considered a Section 1983 lawsuit brought by a former state prisoner who alleged that he had been forced to serve 30 days of his sentence in disciplinary segregation, in violation of procedural due process. The court permitted the lawsuit. Noting that the *Heck* decision had "generated confusion in the lower courts," *id.* at 25, the Second Circuit relied on the opinions in *Spencer v. Kemna* which "revealed that five justices hold the view that, where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be." *Id.* at 26. On

that basis, it concluded "that nothing in Supreme Court precedent requires that the *Heck* rule be applied to a challenge by a prisoner to a term of disciplinary segregation" and, indeed, "that to apply the *Heck* rule in such circumstances would contravene the pronouncement of five justices that some federal remedy — either habeas corpus or § 1983 — must be available." *Id.* at 27 (citing *Spencer*, 118 S. Ct. at 988-90, 992 n.8 (concurring and dissenting opinions)). Similarly, in *Kim v. Hurston*, 182 F.3d 113, 115, 118 & n.3 (2d Cir. 1999), the Second Circuit ruled that *Heck* did not block a prisoner's Section 1983 lawsuit alleging that she was removed from a work release program in violation of procedural due process.

The Second Circuit expanded on its *Jenkins* holding in *Leather v. Eyck*, 180 F.3d 420 (2d Cir. 1999) (Calabresi, J.). There it held that *Heck* did not prevent a person who was convicted in state court and fined, and who never appealed the conviction, from pursuing Section 1983 litigation alleging that he had been selectively prosecuted by the sheriff in retaliation for speech critical of the sheriff's office. The Second Circiut stated that *Heck* left open the question "whether a plaintiff, convicted of a criminal offense, could proceed with a § 1983 claim where no remedy of habeas corpus existed." *Id.* at 424. It concluded:

> Because Leather is not and never was in the custody of the State, he . . . has no remedy in habeas corpus. Having escaped the jaws of *Heck*, Leather should therefore be permitted to pursue his § 1983 claim in the district court unless principles of res judicata or collateral estoppel preclude his suit.

Id. (citation omitted). In *Green v. Montgomery*, 219 F.3d 52 (2d Cir. 2000) (Calabresi, J.), the Second Circuit extended this holding to permit suit by a Section 1983 plaintiff who was incarcerated and who after release filed suit for malicious prosecution. *Id.* at 60 n.3 ("We have held . . . that *Heck* acts only to bar § 1983 suits when the plaintiff has a habeas corpus remedy available to him (i.e., when he is in state custody). Because it

does not appear that Green is presently in custody, his § 1983 action is not barred by *Heck*.") (citations omitted).

The Seventh Circuit has not yet had occasion to issue a square holding on this issue in a case brought by a Section 1983 plaintiff who is not in custody and who alleges damage flowing from his or her state court conviction. But in several decisions it has indicated that it agrees with the Second Circuit that the concurring opinions of Justice Souter in *Heck* and *Spencer* set forth the applicable law in this area. *DeWalt v. Carter*, 224 F.3d 607, 613, 615 & n.4, 616-17 & n.5 (7th Cir. 2000) (indicating that a state prisoner may use Section 1983 to challenge a disciplinary sanction if he is unable to do so through a habeas corpus petition, an "open question" that was not at issue in *Heck*); *Hoard v. Reddy*, 175 F.3d 531, 533 (7th Cir. 1999) (Posner, C.J.) (observing that "there is probably an exception to the rule of *Heck* for cases in which no route other than a damages action under section 1983 is open to the person to challenge his conviction"); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) (Posner, C.J.) (considering a Section 1983 lawsuit by a released state prisoner complaining of the loss of six months good-time credits in violation of due process and observing that "[b]ecause Carr was released from prison after the suit was filed, he could no longer bring a habeas corpus proceeding . . . to get the disciplinary sanction reversed," and that given *Spencer*, "in all likelihood . . . five Justices would not consider the sanction a bar to a section 1983 suit, even though that suit calls into question the validity of the sanction").

First, Sixth, and Ninth Circuits. By contrast, the First, Sixth, and Ninth Circuits — in addition to the Fifth Circuit below — read the opinion of the Court in *Heck* as blocking any Section 1983 lawsuit that is brought by a state prisoner, either during or after incarceration, if the plaintiff has not previously won habeas relief or other relief wiping away the conviction or sanction at issue.

In *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998), the First Circuit considered a Section 1983 lawsuit brought by the family

members of a state prisoner who had died before exhausting his habeas corpus remedies, leading to his habeas petition being dismissed as moot. The lawsuit alleged that the prisoner had been framed by local authorities and sought damages. The First Circuit held that because the Section 1983 claim asserted that the prisoner's "conviction and subsequent imprisonment were unconstitutional," it "must uphold" the dismissal of the claim given this Court's holding in *Heck*, notwithstanding the views set forth by five Justices in *Spencer*. *Id.* at 80-81 & n.3.

In two decisions involving statute of limitations issues, the Ninth Circuit has articulated a similar view of *Heck* as blocking any Section 1983 suit founded upon the invalidity of a conviction unless and until that conviction is invalidated, despite the opinions of five Justices in *Spencer*. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 377, 380 & n.6 (9th Cir. 1998); *Harvey v. Waldron*, 210 F.3d 1008, 1013, 1014-15 n.6, 1016 (9th Cir. 2000) (reaffirming *Cabrera*).

In the aftermath of *Spencer*, the Sixth Circuit initially observed in dictum that "[t]he majority of the Court . . . now clearly excludes from *Heck*'s favorable termination requirement former prisoners no longer in custody." *Schamaeizadeh v. Cunigan*, 182 F.3d 391, 296 n.3 (6th Cir.), *cert. denied*, 528 U.S. 1021 (1999). Recently, however, the court affirmed the dismissal of a Section 1983 lawsuit brought by a prisoner even though he had "long since served his thirty days' detention" of which he complained. *Huey v. Stine*, 230 F.3d 226, 229 (6th Cir. 2000). In doing so, the Sixth Circuit explicitly adopted the view of the First Circuit, concluding:

> Although *Spencer* may cast doubt upon the universality of the "favorable termination" requirement, we will continue to follow the Supreme Court's directly applicable precedent and "leave to the Court 'the prerogative of overruling its own decisions.'"

Id. at 230 (quoting *Figueroa*, 137 F.3d at 81 n.3) (in turn quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

FILED
SEP 26, 2000

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 99-11092

TOMMY RANDELL,

Plaintiff-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division; MELINDA BOZARTH, Director, Texas Board of Pardons and Paroles; JOHN DOE, I; JOHN DOE, II,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

Before WOOD*, DAVIS, and BARKSDALE, Circuit Judges.
PER CURIAM:

The district court held that Tommy Randell's 42 U.S.C. § 1983 complaint for damages was frivolous and therefore dismissed his complaint. Because we determine that the complaint fails to state a cause of action upon which relief may be granted, we affirm.

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* Circuit Judge of the Seventh Circuit, sitting by designation.

I.

Randell was arrested and charged with driving while intoxicated. He alleges that he was incarcerated from September 27, 1996 until June 25, 1997, pursuant to a warrant from the Texas Board of Pardons and Paroles but was not given credit for this time and therefore had to serve the time over again.

By June 18, 1999, the date on which he commenced this litigation, Randell was no longer in custody for the term of confinement in dispute and therefore was ineligible for federal habeas relief.[2] He therefore pursued relief *in forma pauperis* ("IFP") under § 1983, requesting compensatory damages of $1000 for each day he had "served over his sentence." The district court dismissed Randell's § 1983 complaint as frivolous and Randell appealed. We affirm the district court on the grounds that Randell's complaint fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

II.

Randell points out, pro se, that he is no longer in custody and thus can not file a habeas petition. Randell therefore asserts that he does not need to prove that the underlying proceedings upon which his conviction was based have been terminated in his favor, since he can no longer seek habeas relief. However, in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the Court unequivocally stated:

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[2] *See* 28 U.S.C. § 2254(a) (stating that "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.").

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, [footnote omitted] a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Therefore, the Court unequivocally held that unless an authorized tribunal or executive body has overturned or otherwise invalidated the plaintiff's conviction, his claim "is not cognizable under [section] 1983."[3] Because Randell is seeking damages pursuant to § 1983 for unconstitutional imprisonment and has not satisfied the favorable termination requirement of *Heck*, he is barred from any recovery and fails to state a claim upon which relief may be granted.

Based on dicta from concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998), three circuits[4] have concluded that the Supreme Court — if presented with the question — would relax *Heck*'s universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction. Randell has not shown that such a procedural vehicle is lacking; he speaks only of inability to obtain habeas relief.

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[3] *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S. Ct. 2364, 2372 (1994).

[4] *See Jenkins v. Haubert*, 179 F.3d 19, 26 (2d Cir. 1999); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 n.3 (6th Cir. 1999); and *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999).

In the alternative, we decline to announce for the Supreme Court that it has overruled one of its decisions.

We agree with the First Circuit,[5] which stated:

> We are mindful that dicta from concurring and dissenting opinions in a recently decided case, *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998), may cast doubt upon the universality of Heck's "favorable termination" requirement. *See id.* at 19, 118 S. Ct. at 989 (Souter, J., concurring); *id.* at 21, 118 S. Ct. at 990 (Ginsberg, J., concurring); *id.* at 18 n.8, 118 S. Ct. at 992 n.8 (Stevens, J., dissenting). The Court, however, has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court "the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 236, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). We obey this admonition.

Figueroa v. Rivera, 147 F.3d 77, 81 n.3 (1st Cir. 1998).

III.

For the above reasons, the judgment is AFFIRMED.

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[5] The Ninth Circuit also follows this course. *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 n.6 (9th Cir. 1998).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

TOMMY RANDELL,	§	
TDCJ-ID NO. 844659	§	
	§	
Plaintiff,	§	
v.	§	FILED
	§	SEP 3 1999
GARY JOHNSON, et al.,	§	
	§	CIVIL ACTION NO.
	§	5:99-CV-188 C
Defendants.	§	

ORDER

Plaintiff Tommy Randell, acting *pro se*, filed suit pursuant to 42 U.S.C. § 1983 on June 18, 1999, complaining that he was being denied credit for time he had served. Specifically, Plaintiff alleges that he was arrested in Plainview, Texas, and charged with driving while intoxicated. He remained incarcerated in Plainview from September 27, 1996, to June 25, 1997, pursuant to a warrant from the Texas Board of Pardons and Paroles, but he was not given credit for this time and had actually had to serve the time over again. Plaintiff requests that he be granted compensatory damages in the amount of $1000.00 for each day that he had "served over his sentence."

When a party seeks to proceed *in forma pauperis*, the Court shall dismiss the complaint at any time if the court determines that the complaint is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such

relief. 28 U.S.C. § 1915(e)(2)(B). *See* 28 U.S.C. 1915A (providing that a court shall review a prisoner complaint as soon as practicable and dismiss it if it is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from an immune defendant). A claim is frivolous if it has no arguable basis in law or fact. *Neitzke v. Williams*, 490 U.S. 319 (1989). A claim has no arguable basis in the law if it is based on an indisputably meritless legal theory, "such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir. 1998) (quotation omitted). A claim has no arguable basis in fact if "after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless." *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998).

When a state prisoner seeks to challenge the fact of confinement and resolution of his claim results in a speedier or immediate release, the appropriate federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 488-490 (1973). *See Davis v. Fechtel*, 150 F.3d 486, 490 (5th Cir. 1998) (holding that a challenge to the execution of an inmate's sentence and the duration of his confinement should be pursued in a habeas action under 28 U.S.C. § 2241 rather than a civil rights suit under 42 U.S.C. § 1983). The core issue in determining whether a prisoner must pursue habeas relief rather than civil rights actions is to determine whether the prisoner challenges the "fact or duration" of his confinement, or merely the rules, customs, and procedures affecting the "conditions" of his confinement. *Cook v. Texas Dept. of Criminal Justice Transitional Planning Dept.*, 37 F.3d 166, 168 (5th Cir. 1994).

Moreover, if Plaintiff is challenging the "duration" of his confinement, he must first pursue his claim through a writ of habeas corpus in the state courts before he can seek a writ of habeas corpus in federal court. *McGrew v. Texas Board of Pardons and Paroles*, 47 F.3d 158, 161 (5th Cir. 1995).

To the extent that Plaintiff is seeking monetary damages for an allegedly unconstitutional imprisonment, he cannot bring a § 1983 claim until he has had the term of imprisonment reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477, 486-487 (1994). *See Parker v. Fort Worth Police Dept.*, 980 F.2d 1023, 1025 (5th Cir. 1993) (holding that a civil rights claim for damages for illegal detention must exhaust state habeas remedies before pursuing federal habeas remedies).

The Court finds that Plaintiff is challenging the fact or duration of his confinement; therefore, he must pursue his claim through a writ of habeas corpus before seeking damages under § 1983. Therefore, Plaintiff's civil rights complaint is dismissed without prejudice to Plaintiff's right to seek federal habeas relief after his state remedies have been exhausted.

The dismissal of Plaintiff's complaint does not release Plaintiff or the institution where he is incarcerated from the obligation to pay any filing fee previously imposed.

SO ORDERED.

Judgment shall be entered accordingly.

Any pending motions are denied.

Plaintiff is advised that if he appeals this Order, he shall be required to pay the appeal fee of $105.00 pursuant to the Prison Litigation Reform Act, and he must submit an application to proceed *in forma pauperis* and a certified copy of his 6-month Certificate of Inmate Trust Account along with his notice of appeal.

Dated September 3, 1999.

/s/
SAM R. CUMMINGS
United States District Judge